IN THE

Supreme Court of the United States

October Term, 1975

No. 75-562

ROSEBUD SIOUX TRIBE,
Petitioner,

v.

HONORABLE RICHARD KNEIP, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATE OF NORTH DAKOTA, ET AL., AS AMICI CURIAE IN OPPOSITION

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(Other States Joining Set Forth On Inside Cover)

The following States, by their respective Attorneys General, join in the views expressed herein:

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Certain other interested States such as California did not have an opportunity to fully examine the merits of the question presented prior to the printing of this *amici curiae* Brief in Opposition. The Office of the Clerk will be advised directly if they elect to join in the views expressed herein.

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QUESTION PRESENTED

Whether three surplus land statutes enacted pursuant to the General Allotment Act of 1887 were intended by Congress and understood by the members of the Rosebud Sioux Tribe to disestablish certain portions of the original Rosebud Reservation.

INTEREST OF AMICI CURIAE

The State of North Dakota and the other States joining herein have a general interest in the manner in which any question of Federal Indian Law is resolved. In terms of the instant case, however, there is an overriding consideration that merits particular attention. Namely, the arguments in the

Petition that are directed at circumventing the intent of Congress and the understanding of the Tribe. Because of a similar concern in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), a Brief for the State of North Dakota et al., as *amici curiae* was also submitted therein for the consideration of the Court. After *DeCoteau*, which was a commendable decision in our view, litigation aimed at re-establishing *original* reservation boundaries contrary to the intent of Congress should have been laid to rest. Unfortunately, this was not necessarily so. For this reason, the proceedings below were of a continuing interest to all. As in *DeCoteau*, the decision of the Eighth Circuit Court of Appeals when announced, was received with approval and deservedly so. After notification was received that a Petition for a Writ of Certiorari would be filed with this Court, the opinion and certain of the briefs were again carefully examined and considered by each state. It is the consensus of *amici curiae*, without exception, that the decision of the Eighth Circuit Court of Appeals is in conformity with all of the "guiding principles" set forth and reiterated in *DeCoteau*. This Brief is respectfully submitted in opposition to a Petition that would truly turn on their heads not only *DeCoteau* and the general principles governing the construction of Indian statutes, but also every fundamental premise which Congress, the States, and the Tribes have justificably relied on for decades. All arguments are intended to support and supplement those set forth at length in the Brief for Respondents in Opposition.

ARGUMENT

I

CONGRESS CONSIDERED THE ROSEBUD LEGISLATION WITHIN THE SAME HISTORICAL CONTEXT AS THE 1891 ACT RECENTLY CONSTRUED IN *DECOTEAU V. DISTRICT COUNTY COURT*, 420 U.S. 425 (1975).

The primary thrust of the Brief for Respondents in Opposition is directed to the fact that the historical circumstances

set forth in *DeCoteau* are the same as those underlying the Rosebud legislation. In further support of this position, it should be noted that the Rosebud legislative history specifically confirms that the intent of Congress remained the same. In a number of instances, the individuals primarily responsible for the three Rosebud Acts stated that the significant provisions of the 1891 Act construed in *DeCoteau* constituted "precedent" for similar provisions in the Rosebud legislation.

The most lucid example of this "precedent" appears in conjunction with the school lands grant. In congressional debate, Congressman Burke of South Dakota never faltered in his explanation of the condition precedent to the grant that was set forth in the South Dakota Enabling Act:

> Mr. Burke: I am glad that the gentleman has asked me that question. I would state that under the enabling act under which the State of South Dakota was admitted to the Union it was provided that sections 16 and 36 in said State should be reserved for the use of the common schools of that State, *and it further provided that as to the lands within an Indian reservation the provisions of that grant would not become operative until the reservation was extinguished and the land restored to the public domain. That enabling act was passed by Congress on the 22nd day of February, 1889.* 38 Cong. Rec. 1423 (1904) (emphasis added).

Since the Rosebud legislation was intended to extinguish the surplus portion of the Rosebud Reservation and restore it to the public domain, as other surplus land statutes had in the past, the school lands grant had to be included in each Rosebud Act. Significantly, all of the earlier surplus land statutes that contained the grant, which are conceded in the Petition to have satisfied the condition precedent in the enabling act, including the 1891 Act construed in *DeCoteau*, are listed as "precedent" for the Rosebud grant in the 1907 Rosebud House Report submitted by Congressman Burke on behalf of the House Committee on Indian Affairs:

Section 6 of the bill reserves section 16 and 36 in each township for the use of the common schools, and grants the same to the State of South Dakota, and section 7 makes an appropriation to pay for the same at $2.50 per acre. *This is following the precedents which have heretofore been established in the opening of other reservations in South Dakota,* and is based upon section 10 of the act of Congress admitting South Dakota into the Union, approved February 22, 1889. Said section is as follows:

> 'Sec. 10: That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any part thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such a manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided.* That the sixteenth and thirty-sixth section embraced in permanent reservations for national purposes shall not at any time be subject to the grants nor to indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act **until the reservation shall have been extinguished and such lands restored to and become a part of the public domain.'**

The following are the precedents:

By section 30 of the Act opening and dividing the Great Sioux Reservation, sections 16 and 36 were granted to the State and an appropriation of $1.25 per acre was made to pay for same. Act approved March 2, 1889. (25 Stat. L., 898).

By section 30, Act approved March 3, 1891, opening the Sisseton and Wahpeton Reservation, the school sections were ceded to the State and an appropriation made, and the same were paid for at $2.50 per acre. (26 Stat. L., 1039).

By Act of August 15, 1894, opening the Yankton Reservation, the school sections were ceded to the State and paid for at $3.75 per acre. (28 Stat. L., 313). H. R. Rep. No. 7613, 59th Cong., 2d Sess. 3-4 (1907) (emphasis added).

In later congressional debate on another bill, Congressman Burke's counterpart in the Senate, Senator Gamble of South Dakota, viewed the Rosebud legislation from the same perspective:

> That is the obligation of the Government and the contract entered into in the enabling act; and since the admission of these States it has been the policy of the Government to pay the Indian tribes the price fixed for sections 16 and 36. *As I have recited upon a former occasion, on the opening of the Sisseton Reservation, in the northeastern part of the State, $2.50 per acre was paid by the Government to the Indians for the cession of the lands in sections 16 and 36, and $3.50 was paid per acre on the opening of the Yankton Reservation in the same State.* The same policy has been pursued in connection with the opening of Gregory County, a part of the Rosebud Reservation, for which $2.50 per acre was paid. The same is true as to lands in Tripp County, in the Rosebud Reservation, and in two bills already passed during the present session for the opening of other lands in the Rosebud Reservation . . . 45 Cong. Rec. 5788 (1910) (emphasis added).

Thus, apart from the fact that the school lands grant constitutes persuasive evidence of disestablishment *per se,* the "precedent" for the grant listed by the two co-sponsors of the Rosebud legislation clearly places the Rosebud legislation

squarely within the historical context of *DeCoteau*. In terms of the question presented, the intent of Congress remained the same. [1]

II

SEYMOUR, MATTZ AND DECOTEAU SET FORTH WITH CLARITY THE GUIDING PRINCIPLES THAT ARE CONTROLLING.

The Petition seeks to circumvent the intent of Congress and the understanding of the Rosebud Sioux Tribe by asserting that the Rosebud Acts were "unilateral" in nature. Inherent in this assertion is an assumption that such a situation would automatically lead this Court to a conclusion similar to that reached in *Seymour v. Superintendent*, 368 U. S. 351 (1962), and *Mattz v. Arnett*, 412 U. S. 481 (1973). In both respects the Petition is not persuasive.

In the first instance, the Brief for Respondents in Opposition erodes the basis for the assertion. The Rosebud Acts were not unilaterial actions by Congress. A majority of the adult male members of the Rosebud Sioux Tribe consented to each Act. Brief for Respondents at 23, 27, 29. Secondly, even if an example of unilateral congressional action would have presented, this fact alone has never in the past precluded this Court from accepting the judgment of Congress in this respect. On numerous occasions similar pleas have been rejected by this Court and the basic constitutional reasons for this rejection merit special attention. Although the landmark decision of *Lone Wolf v. Hitchcock*, 187 U. S. 553 (1903), was cited and explained by Respondents, *amici curiae* deem the analysis of Justice White deserving of more extended treatment:

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1. In *DeCoteau* this court noted that the intended effect of the 1891 Act was "made clear by the sponsors of the comprehensive legislation." *DeCoteau, supra* at 440. The tenor of the passage of the Congressional Record set forth in support of this conclusion in *DeCoteau* is echoed by the *sponsors* of the Rosebud legislation throughout the legislative history. Pet. App. A at 17-19, 29, 50-52.

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government . . . .
>
> In view of the legislative power possessed by Congress over treaties with the Indians and Indian tribal property we may not specially consider the contentions pressed upon our notice that the signing by the Indians of the agreement of October 6, 1892, was obtained by fraudulent misrepresentations and concealment; that the requisite three-fourths of adult male Indians had not signed, as required by the twelfth article of the treaty of 1867, and that the treaty as signed had been amended by Congress without submitting such amendments to the action of the Indians, since all these matters, in any event, were solely within the domain of the legislative authority, and its action is conclusive upon the courts . . . .
>
> In any event, as Congress possessed full power in the matter, the judiciary can not question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained. *Lone Wolf, supra* at 557.

All aspects of *Lone Wolf* represent the very foundation of Federal Indian Law. Felix S. Cohen, an acknowledged expert in this area of the law, addressed the ramifications of the principles enunciated in *Lone Wolf* in his treatise on Federal Indian Law at 94-115. In Cohen's words:

> The control by Congress of tribal lands has been one of the most fundamental expressions, if not the *major* expression, of the constitutional power of Congress over Indian affairs, and has provided most frequent occasion for judicial analysis of that

> power. From the wealth of judicial statement there may be derived the basic principle that Congress has a very wide power to manage and dispose of tribal lands. F. Cohen, *HANDBOOK OF FEDERAL INDIAN LAW* 94-95 (University of New Mexico Press) (emphasis addded).

The analysis is supported by citations to decisions such as *Roff v. Burney*, 168 U. S. 218 (1897); *Stephens v. Cherokee Nation*, 174 U. S. 445 (1899); *Cherokee Nation v. Hitchcock*, 187 U. S. 294 (1902); *Blackfeather v. United States*, 190 U. S. 368 (1903); *Choate v. Trapp*, 224 U. S. 665 (1912); *Ex parte Webb*, 225 U. S. 663 (1912); *United States v. Osage County*, 251 U. S. 128 (1919); *Nadeau v. Union Pacific R. R. Co.*, 253 U. S. 442 (1920); *Sioux Indians v. United States*, 277 U. S. 424 (1928) as well as *Lone Wolf, supra.*

The Petition does not ask this Court to overrule *Lone Wolf* or any of the above decisions. Indeed, this issue was not even raised in the court below. Rather, the Petition has simply lifted the term "unilateral" from the two paragraphs of differences noted by this Court at the end of the opinion in *DeCoteau.* Armed with the term, the Petition then asserts that this Court has *held* that statutes unilaterally enacted by Congress do not disestablish portions of reservations. The singular fact that the acts in *Seymour* and *Mattz* were unilateral in nature was but one of many of the differences set forth in the two paragraphs of the *DeCoteau* opinion. Among others, the Court also noted that the circumstances surrounding congressional action therein "militated persuasively against" a finding of disestablishment. *DeCoteau, supra* at 448. No *holding* of this Court has ever approached the force of the assertion presented in the Petition. *Lone Wolf et al., supra,* are persuasive documentation of this fact. This attempt of the Petition to bring the Rosebud legislation within the specific fact situations that militated persuasively against disestablishment in other cases on other reservations cannot be persuasive. The facts in Rosebud definitely do not militate persuasively against a finding of disestablishment.

Moreover, the opinions in all three decisions make clear that the overriding issue was congressional intent and the understanding of the tribe. In *Seymour* this Court stressed that it was:

> unable to find where *Congress* has taken away from the Colville Indians any part of the land within the boundaries of the area which has been recognized as their reservation since 1892. *Seymour, supra* at 359 (emphasis added)

In *Mattz,* this Court stated that the case:

> turns on the resolution of the *narrow question* whether the Klamath River Indian Reservation in northern California was terminated by *Act of Congress. Mattz, supra* at 483 (emphasis added).

The task of the Court in *Mattz* was succinctly stated.

> It is our task, in light of the language and purpose of the Act, as well as of the historical background, outlined above, *to determine the proper meaning of the Act* and, consequently, the current status of the reservation. *Mattz, supra* at 495 (emphasis added).

DeCoteau reiterated that the "task here is a *narrow* one." *DeCoteau, supra* at 449 (emphasis added). The issue presented was one of statutory construction. In the instant case, the issue remains the same.

III

THE INTENT OF CONGRESS AND THE UNDERSTANDING OF THE ROSEBUD SIOUX TRIBE MAKE CLEAR THE EFFECT OF THE ROSEBUD LEGISLATION.

Had the Petition raised any question worthy of the jurisdiction of this Court that had heretofore not been resolved, *amici curiae* would not have strenuously opposed the issuance of a Writ of Certiorari. But such a question has not been raised.

This Court has expended sufficient time and effort in *Seymour, Mattz* and *DeCoteau* to set forth with clarity the "guiding principles" that are controlling. The decision below is in conformity with those principles.

Although the Petition is couched in terms of a disaster that is eminent if the decision below is allowed to remain intact, *Seymour, Mattz* and *DeCoteau* preclude a blanket application of the *result* of any one case to the fact situation in another. To accurately assertain the intent of Congress and the understanding of each tribe in even the multitude of statutes set forth in the Petition would take an entire staff of attorneys a number of months.[2] In at least some instances, as in *DeCoteau* and the case at bar, a conclusion similar to that reached below would not result in a destruction of any portion of any reservation that has been *recognized* as such since the passage of the statute in question. Even in these instances, however, some court must have an opportunity to view the facts presented in order to establish if the recognition of disestablishment was in conformity with the intent of Congress and the understanding of the tribe. In other instances this intent and understanding might preclude a finding of disestablishment as in *Seymour* and *Mattz*.

But this is all speculation, pure and simple. Speculation does not present a fact situation with which this Court can be concerned. Other petitions for a writ of certiorari can continue to provide access to this Court in any situation where someone asserts that a court below has departed from the "guiding principles" of *Seymour, Mattz* and *DeCoteau*. In this case, the Petition is not persuasive. The court below

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2. A general compilation of surplus land statutes enacted subsequent to 1887 in the National Indian Law Library, Boulder, Colorado, lists 75 separate entries. N.I.L.L. No. 002279. At least 43 of these statutes should have been included in the table set forth as Appendix D in the Petition. Although they are not catagorized along the lines of the new definition of a surplus land statute that emerges in the Petition, all 43 statutes are definitely within the structure of that definition. The author of the compilation did not even attempt to set forth either the legislative or the jurisdictional history of any of the statutes.

followed the "guiding principles" of *Seymour, Mattz* and *DeCoteau*.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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December, 1975